COLORADO
Department of Regulatory Agencies
Division of Professions and Occupations

Report and Recommendations of the Direct-Entry Midwife Risk Management Working Group

Pursuant to
§12-37-109(3)(b)(I), C.R.S.

October 1, 2016

COLORADO
Department of Regulatory Agencies
Division of Professions and Occupations

October 1, 2016

Dear Executive Director Neguse,

The Working Group established pursuant to §12-37-109(3)(b)(I), C.R.S. to review the risk management tools for Colorado-registered direct-entry midwives respectfully presents this report and recommendations regarding risk management in direct-entry midwifery practice.

Pursuant to §12-37-109(3)(b)(I), C.R.S., the Working Group reviewed the risk management tools outlined in the statute, but found no traditional financial tools to help manage the risk of practicing direct-entry midwifery care. While a few carriers offer liability insurance for direct-entry midwives, the premiums remain high and out of reach for an average direct-entry midwife in Colorado. However, the Working Group believes the recommendations will mitigate risk in direct-entry midwifery practice by strengthening registration requirements to ensure that both direct entry-midwives practice safely and that consumers are protected.

It was a pleasure to serve on this Working Group and address these important issues.

Thank you for your consideration of these recommendations.

Sincerely,

Leo Boyle
Dick Brown
Ann Geisler
Jan Lapetino, RM, CPM
Indra Lusero, Esq.
Jean Martin, MD, Esq.
Elliott Williams

Creation and Charge of the Direct-Entry Midwife Risk Management Working Group

On June 10, 2016, Governor John Hickenlooper signed House Bill 16-1360 Concerning the Continuation of the Regulation of Direct-Entry Midwives, which continued the Department of Regulatory Agencies' (DORA) regulation of direct-entry midwives and gave DORA the authority to implement the recommendations from the 2015 Sunset Review: Direct-Entry Midwives. The legislation also gave DORA's Executive Director the authority to convene a Working Group to specifically investigate ways of managing risks in the practice of midwifery.

The new law, §12-37-109(3)(b)(I), C.R.S., gave the Working Group the authority to:

> *...assess potential mechanisms for managing risks, including methods for mitigating liability; professional liability insurance; the creation and operation of a joint underwriting authority; a risk retention group; letters of credit; and posting surety bonds or other financial instruments or arrangements that could be used to satisfy a claim based on professional negligence.*

The new law required the Working Group to report its findings to DORA's Executive Director by October 1, 2016. After receiving the report, the Director must provide the report and any recommendations for legislation to the House Health, Insurance, and Environment Committee and the Senate Health and Human Services Committee by November 1, 2016.

Working Group Members

In August 2016, Joe Neguse, DORA's Executive Director, appointed the following individuals to the House Bill 16-1360 Direct Entry Midwife Risk Management Working Group:

Leo Boyle - Contract Lobbyist, Colorado Midwives Association
Dick Brown - Contract Lobbyist, The Doctors Company and Colorado Obstetrical and Gynecological Society
Ann Geisler - Founder and President, Southern Cross Insurance
Jan Lapetino, RM, CPM - Colorado Midwives Association
Indra Lusero, Esq. - Founder and President, Birth Rights Bar Association and The Elephant Circle
Jean Martin, MD, Esq. - Legal Counsel, COPIC
Elliott Williams - Contract Lobbyist, Colorado Organization for Latina Opportunity and Reproductive Rights (COLOR)

Meetings and Discussion

In order to meet the October 1, 2016 reporting deadline, the Working Group met on September 12, 2016, and September 22, 2016 at the Department of Regulatory Agencies' office in downtown Denver. Ms. Geisler participated by phone during the first meeting and was unable to attend the second meeting.

History, Background and Demographics

Before assessing the topics outlined for review in House Bill 16-1360, the Working Group discussed some of the direct-entry midwives regulatory history, which began in 1993. Significant discussion focused on the profession's small numbers in Colorado and relatively low income compared to other providers such as certified registered nurse midwives who are regulated by Colorado's State Board of Nursing. As of September 19, 2016, only 71 direct-entry midwives were registered with DORA's Office of Direct-Entry Midwife Registration. According to a poll conducted by the Colorado Midwives Association in 2015, the average salary for a direct-entry midwife in Colorado is between $30,000-$40,000. Because of the profession's small numbers, no other salary surveys were found for Colorado based direct-entry midwives. The Working Group recognized early in its deliberations that the small numbers, lower salaries and lack of other pertinent data, significantly affect the recommendation at this time and the type of risk management tools available for direct-entry midwives in Colorado.

Assessment of Potential Mechanisms for Managing Risk

House Bill 16-1360 provided a specific list of risk management tools the Working Group was authorized to assess. Each item on the list was reviewed and discussed in the context of whether or not it could help mitigate risk, given the size of the profession and the level of assets at risk for each individual direct-entry midwife. In addition, while the Working Group discussed the potential availability of reliable statistical data that would clearly identify specific practice-related risks associated with direct-entry midwifery care, it was unknown at the Working Group meeting if such data was available (noting that such data could be potentially collected in the future by DORA as it relates to the function of Midwives Data Review Task Force established by House Bill 16-1360 (Concerning the Continuation of the Regulation of Direct-Entry Midwives). Topics assessed include:

- *professional liability insurance;*
- *creation and operation of a joint underwriting authority;*
- *creation of a risk retention group;*
- *letters of credit; and,*
- *posting surety bonds or other financial instruments or arrangements that could be used to satisfy a claim based on professional negligence.*

Professional Liability Insurance

While some policies may be available to Colorado direct entry midwives, the premiums for the policies remain very expensive relative to a direct-entry midwife average income. Current Colorado law states:

> *If the director finds that liability insurance is available at an affordable price, registrants shall be required to carry such insurance.*

A policy offered by Southern Cross Insurance, one of the few carriers that insures direct-entry midwives, starts at $2,500/year. The Colorado Midwives Association believes any policy premium over $1,000/year would be too expensive for the average Colorado direct-entry midwife to purchase. Because of the small number of potential policyholders, it may be statistically difficult to assess risk and set a reasonable premium for this type of policy. Two different Working Group members representing COPIC and Southern Cross Insurance in Florida confirmed the challenges inherent in assessing a small group. In order to spread the risk, there has to be a large enough pool of individuals. Otherwise, premiums start high and remain very sensitive to any claim.

Impact of Health Care Availability Act

While medical malpractice insurance remains out of reach, the Working Group assessed what type of general liability insurance may be available as an alternative. Specifically, the Group evaluated whether or not direct-entry midwives currently fall under the $1,000,000 cap on liability contained in the Health Care Availability Act (HCAA). Prior to 2011, direct-entry midwives were expressly excluded under the Direct-Entry Midwifery Act from the limitations provided in the HCAA. In 2011, the Colorado General Assembly repealed the previous exclusion of direct-entry midwives from coverage by the cap on liability. The Working Group, however, determined that the applicability of the HCAA to direct-entry midwives may be open to interpretation by a court. Uncertainty that the cap on liability extends to direct-entry midwives likely impacts the availability and affordability of liability insurance.

Joint Underwriting Authority

Any type of underwriting authority requires a strong funding source. This model would provide an insurance product that could be underwritten by sources other than just premiums. For instance, state funds or insurance carrier assessments could supplement premiums. A similar “high risk pool”, known as Cover Colorado, was created in Colorado for individuals with pre-existing health conditions. However, the pool of individuals was much larger and the federal government mandated that each state develop a high risk pool for health insurance if it was not available to those with pre-existing conditions. Working Group members determined this was not a viable option because the group is too small and would require too much subsidization by other funding sources.

Risk Retention Groups (RRG)

According to the National Risk Retention Association, a risk retention group (RRG) is a corporation or other limited liability association, functioning as a captive insurance company and organized for the primary purpose of assuming and spreading the liability risk exposure(s) of its group members (member-owners). It must be chartered and licensed as a liability insurance company in one of the fifty states or the District of Columbia. An RRG must be owned by its insureds and is regulated mostly by the federal government. The Working Group determined an RRG is not an option for a profession with such small numbers.

Letters of Credit
According to *Barrons Dictionary of Finance and Investment Terms*, a letter of credit is an instrument or document issued by a bank, guaranteeing the payment of a customer's drafts up to a stated amount for a specified period of time. The Working Group determined this risk management tool was not an option for direct-entry midwives because it is used in commercial transactions.

Surety Bonds
According to the United States Small Business Administration, a surety bond ensures contract completion in the event a contractor defaults. The Working Group determined this risk management tool is not appropriate for direct-entry midwives and applies to commercial business contracts.

After assessing all the options specifically listed in the legislation, the Working Group also discussed the possibility of establishing health courts as an alternative to the traditional tort system, or establishing an administrative compensation system. The Working Group determined these tools were not options for risk management because of the small numbers.

Recommendations

The Working Group concluded, given the current data available, that there are no traditional risk management tools that will effectively manage the risk of such a small group of people that earns an average salary between $30,000 - $40,000. However, mandating certain training requirements could strengthen the knowledge and skills of direct-entry midwives, which may decrease risk for negative outcomes due to a direct-entry midwife's negligence.

Therefore, the Working Group submits the following recommendations for the Executive Director's consideration:

1. **Require all direct-entry midwives to demonstrate a current Certified Professional Midwife (CPM) certification issued by the North American Registry of Midwives at registration renewal. Currently, it is only required at initial registration. This certification includes continuing education requirements, neonatal resuscitation (NRP) training, cardiopulmonary resuscitation (CPR) training, and peer review. Direct-entry midwives registered prior to 2003, who were not required to hold a CPM credential, must demonstrate equivalent training upon registration renewal;**

2. **Establish a direct-entry midwife peer review legal privilege to ensure confidentiality for the purpose of fostering frank discussion of cases to promote best practices in collaboration with other healthcare providers; and**

3. **Require all direct-entry midwives to obtain and maintain competency in medication and intravenous fluid administration, and eliminate the separate authorities and associated fees for such authorities. While such authorities are currently permissive, direct-entry midwives are trained to perform these skills, regardless of whether they choose to provide the service to a patient. Requiring all direct-entry midwives to maintain these skills increases consumer protection.**